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In The
# Supreme Court of the United States

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.,

*Petitioners,*

vs.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF *AMICUS CURIAE* OF FORMER CHAIRS AND GENERAL COUNSELS OF THE COUNCIL ON ENVIRONMENTAL QUALITY IN SUPPORT OF RESPONDENTS

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## STATEMENT

Every surviving former Chair of the Council on Environmental Quality (CEQ) and every surviving former General Counsel of CEQ submits this *amicus* brief in support of respondents' claims arising under the National Environmental Policy Act (NEPA), urging this Court to affirm the unanimous decision of the Tenth Circuit on those claims. This brief is confined to the NEPA issues and does not address other issues before the Court. It is submitted upon the blanket consents of counsel for petitioners and respondents, filed with the Court.

## INTEREST OF *AMICI* [1]

This brief is submitted on behalf of former Chairs and General Counsels of the Council on Environmental Quality in the Executive Office of the President[2] whose service extends back to the enactment of NEPA and the creation of the CEQ during the Nixon Administration. The CEQ Chairs joining in this brief include Russell Train (Nixon Administration), Russell Peterson (Nixon and Ford Administrations), John Busterud (Ford Administration), Charles Warren (Carter Administration), J. Gustave Speth (Carter Administration), Michael Deland (first Bush Administration), Kathleen McGinty (Clinton Administration), and George Frampton (Clinton Administration). The

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] *See* 42 U.S.C. §§ 4341 *et seq.*, 4371 *et seq.* (establishing CEQ).

CEQ General Counsels joining in the brief include Gary Widman (Nixon and Ford Administrations), Nicholas C. Yost (Carter Administration), and Nancy Nord (Reagan Administration). Each of them retains an interest in the proper and effective implementation and interpretation of the Act. Counsel of Record, General Counsel of the CEQ during the Carter Administration, was lead draftsperson of the Council's Regulations implementing the National Environmental Policy Act of 1969 (40 C.F.R. Parts 1500-1508), which this Court has consistently held are entitled to substantial deference.[3] Co-counsel was his predecessor as General Counsel, who advised the CEQ concerning the Guidelines which preceded the Regulations.

## SUMMARY OF ARGUMENT

This Court most properly held in *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989), that it would be "incongruous" if blinders to adverse environmental effects, once removed, were restored "prior to the

[3] *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) ("CEQ's interpretation of NEPA is entitled to substantial deference"); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1979) (same); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989) (same). The CEQ's NEPA Regulations, derived in part from its earlier Guidelines, have remained in effect from the Administration of President Jimmy Carter through that of President George W. Bush with only one intervening amendment to one section. *See* Yost, *Streamlining NEPA – An Environmental Success Story*, 9 B.C. Envtl.Aff.L. Rev. 507 (1982). (Congress has also implicitly approved the importance of the CEQ regulations as recently as 2003. In its recently enacted legislation, for instance, Congress specifically incorporated portions of the CEQ NEPA regulations. *See, e.g.*, 16 U.S.C. § 6511(7)(C); 16 U.S.C. § 6514(c)(1)(C)(ii).)



completion of agency action simply because the relevant proposal has received initial approvals." Many "actions" taken by federal agencies are not discrete, one-time events, but rather represent "ongoing actions" to which continuing NEPA obligations must attach for the Act's purpose to be realized. In addition, the information and circumstances set out may significantly change during the pendency of an ongoing action, such as during implementation of a plan. *Amici* urge this Court to reiterate and reinforce its commitment to the application of NEPA to the ongoing actions of the Federal Government.

In applying NEPA to ongoing actions of federal agencies, at least three of NEPA's "action-forcing" devices are potentially applicable – section 102(2)(C)'s Environmental Impact Statement (EIS) requirement (with its significance threshold), section 102(2)(E)'s Environmental Assessment (EA) requirement (which has no such threshold), and section 102(1)'s requirement for agencies to act in accordance with the policies set out in NEPA (also with no significance threshold).

*Amici* respectfully suggest that this case presents the very paradigm of when NEPA's requirement for a Supplemental Environmental Impact Statement (SEIS) applies to Bureau of Land Management's (BLM) ongoing actions with respect to Wilderness Study Areas (WSAs), when there exists new information of significant new environmental impact, and when the action has not been concluded by a decision one way or the other as to permanent wilderness designation. At minimum, NEPA's independent and "action-forcing" requirement for an EA applies, which has a lower threshold than does an EIS (and the analysis in which may or may not lead to an EIS). Additionally and alternatively, there have in this case been "actions" subject

to NEPA covering less than the entire geographic area that is the focus of this case which are themselves subject to NEPA. It may be that they collectively result in cumulative impacts requiring a program EIS. The additional "action-forcing" requirement for federal agencies to administer their policies and laws in accordance with the congressional policies set out in NEPA should guide the BLM.

## ARGUMENT

### I. THE EFFECTIVE IMPLEMENTATION OF NEPA REQUIRES THAT IT APPLY TO THE "ONGOING ACTIONS" OF THE FEDERAL GOVERNMENT

In its most recent decision involving NEPA this Court stated:

> The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose. . . . It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in *TVA v. Hill*, although "it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment," up to that point, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally "significant."



*Marsh*, 490 U.S. at 371 (internal citation omitted). The Court's instruction retains its wisdom and controls the NEPA issues before the Court. While the Court of Appeals for the Tenth Circuit was divided on the APA issues, it ruled unanimously for Respondents on the NEPA issue. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002).

#### A. Congress Intended to Change Agency Priorities with Its Passage of NEPA

The former CEQ officials joining in this brief, concerned for the continuing integrity – and indeed vitality – of NEPA, respectfully submit this *amicus* brief to give voice to that concern and to assist the Court in addressing the important NEPA issues before it. NEPA is, in the words of the CEQ Regulations, "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It establishes policy (42 U.S.C. § 4331 (§ 101)), and provides means (42 U.S.C. § 4332 (§ 102)), for carrying out that policy.[4] To that end, section 102 (42 U.S.C. § 4332, contains

[4] "The basic principle of this policy," said Senator Henry Jackson, NEPA's Senate author, "is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings." 115 CONG. REC. 40416 (1969) (Statement of Sen. Jackson). Senator Jackson recognized, however, that "a statement of environmental policy is more than a statement of what we believe . . . it provides a statutory foundation . . . for guidance in making decisions which find environmental values in conflict with other values." *Id.* "[W]e must consider the natural environment as a whole and assess its

(Continued on following page)

"action-forcing" provisions to ensure that federal agencies act according to the letter and spirit of the statute. *See* 40 C.F.R. § 1500.1(a); S. REP. NO. 91-296, at 19 (1969); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). By its own terms NEPA supplements the policies and goals set forth in the existing authorizations of federal agencies. 42 U.S.C. § 4335 (§ 105).

In enacting NEPA, Congress fully appreciated the significance of what it was doing and of the impact the enactment would have on the operations of the Federal Government. The Act was "the most important and far-reaching environmental and conservation measure ever enacted," said its lead author in the Senate, Henry Jackson. 115 CONG. REC. 40416 (1969) (Statement of Sen. Jackson). "It is the unanimous view" of the members of the Senate Committee that reported out NEPA, "that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces." S. REP. NO. 91-296 at 4 (1969).[5] The Committee found that such conditions presented "a serious threat to the Nation's life support system." *Id.* at 13. Indeed, "[t]he Nation has in many areas overdrawn its bank account in life-sustaining natural

quality continuously . . . " stated NEPA's House author, Representative John Dingell. 115 CONG. REC. 26571 (1969) (Statement of Rep. Dingell).

[5] There exist both a Senate Report and a House Report (H.R. REP. NO. 91-378, pts. 1 & 2 (1969)) concerning NEPA, along with a Conference Report employed by the House Managers to explain the conferees' changes to the bill. H.R. REP. NO. 91-765 (1969). Since the "action-forcing" provisions of NEPA originated in the Senate, their legislative history is reflected in the Senate Report (and to a lesser extent the Conference Report) but not in the House Report.



elements." *Id.* at 16. In the Committee's words, "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." *Id.* at 5. The House was no less committed to action and to change. "There may be controversy as to how close to the brink we stand," states the House Report, "but there is none that we are in serious trouble." H.R. REP. NO. 91-378 at 4 (1969).

NEPA's impact was equally clear to the President. When signing the bill into law on January 1, 1970, President Nixon emphasized the boldness of the bill by declaring it "particularly fitting that my first official act of this new decade is to approve the National Environmental Policy Act." 5 Weekly Comp. Pres. Doc. 11 (Jan. 5, 1970).

While NEPA establishes an environmental policy for the Nation, the Act, by its terms, recognizes full well that agencies are required to balance legitimate, and sometimes competing, values that have been given Constitutional or statutory national priority. The Act instructs agencies to use all practical means, "consistent with other essential considerations of national policy," to implement the policies set out in the statute. 42 U.S.C. § 4331(b) (§ 101(b)). The CEQ itself has been fully aware of and has acted to recognize such other competing essential considerations of national policy. For instance, the CEQ NEPA Regulations themselves set out 17 measures that agencies are bound to follow to reduce paperwork (40 C.F.R. § 1500.4) and 12 such measures to reduce delay (40 C.F.R. § 1500.5). "NEPA's purpose," after all, "is not to generate paperwork – even excellent paperwork – but to foster excellent action." 40 C.F.R. § 1500.1(c).

In submitting this brief, the former CEQ officials recognize the legitimacy of the Government's concern that courts not become officious intermeddlers in the environmentally benign day-to-day routines of government.[6] That said, *amici* strongly urge this Court to continue to recognize, as it did in *Marsh*, 490 U.S. at 1371-1374, that federal "actions" are often not one-shot events, but rather are ongoing actions, and that NEPA's obligations are not terminated by a past decision, in those cases where the actions are continuing and where environmental impacts exceed earlier projections. An agency's consideration of later-arising circumstances or information regarding the environmental impacts of its actions, while those actions remain ongoing, is essential to fulfilling NEPA's goal of environmentally-informed decisionmaking. Compliance with those continuing obligations need not unduly burden agencies because they can use efficient approaches to analyze the effects of new information (40 C.F.R. §§ 1500.4 and 1500.5) and can use the various devices available (*see, e.g.*, 40 C.F.R. §§ 1502.20 and 1508.28 (tiering), 1502.21 (incorporation by reference), 1506.3 (adoption), 1500.4(i), 1502.4 and 1502.20 (program documents)) to tier from an earlier document and to focus discussion on the extent to which the new information adds to or changes impacts

[6] Indeed, the CEQ NEPA Regulations require that each agency adopt as part of its implementing procedures "categorical exclusions" whereby categories of actions that do not either individually or cumulatively have significant environmental impacts are identified and excluded from any further examination under NEPA (meaning neither an EA nor an EIS is required). 40 C.F.R. § 1508.4; *see also* 40 C.F.R. § 1507.3(b)(2)(ii). (BLM's procedures have no categorical exclusion for increased ORV use. 516 DM 6, Appendix 5.4 (Department of Interior, Department Manual)).



analyzed earlier. With specific regard to a SEIS requirement (discussed in section I(C) of this brief, *infra*.), it must be kept in mind that not all new information will trigger an SEIS, only "significant new circumstances or information. . . ." 40 C.F.R. § 1502.9(c)(1)(ii). In addition, the ability to use "categorical exclusions" to remove from NEPA's applicability actions that can have no environmental impacts, affords agencies the opportunity to exclude from further study entire categories of environmentally benign activities. 40 C.F.R. § 1508.4; *see also* footnote 6, *supra*.

### B. NEPA's "Action-Forcing" Devices Apply Broadly to the Actions – Including the Ongoing Actions – of the Federal Government

As its congressional authors instructed, and as this Court has noted on numerous occasions, NEPA created "action-forcing" procedures to help ensure that its environmental policies are implemented. S. REP. NO. 91-296 at 9; *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *Andrus*, 442 U.S. at 350; *Marsh*, 490 U.S. at 372; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 369 (1979).

The Government's brief has devoted special attention to one of those action-forcing devices, the EIS, (42 U.S.C. § 4332(2)(C) (§ 102(2)(C))). Brief for Petitioners (Pet. Brief) at 11, 36-38. (In its Appendix, for instance, it quotes section 102(2)(C), but does not include section 102(2)(E), which provides a separate action-forcing provision.) The EIS, with its statutory threshold of "major federal action significantly affecting the quality of the human environment," is perhaps the most publicized of the action-forcing devices, but it is not the only one. For purposes of this case, at least two other such devices are relevant, namely, sections 102(2)(E) (requiring the examination of alternatives) and

102(1) (requiring adherence to NEPA's policies). Both these sections of the statute, discussed below, are relevant to the Court's disposition of the NEPA issues in this case.

**(1) Section 102(2)(E) Applies to Require Agencies to Examine Alternatives Even When the Environmental Impacts are Not Significant.**

The provision requiring an EA, section 102(2)(E) (42 U.S.C. § 4332(2)(E)), applies far more broadly than does that for an EIS, that is, it has a much lower threshold of applicability.[7] *See* 40 C.F.R. § 1508.9.[8] In its totality, the pertinent subsection reads: "[A]ll agencies of the Federal Government shall – . . . (E) Study, develop, and describe appropriate alternatives to recommended courses of action in

[7] The Court, in reviewing the adequacy of an EA, has had occasion to note the distinction between an EA and an EIS. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 225 (1980).

[8] The section of the CEQ NEPA Regulations defining "Environmental Assessment," 40 C.F.R. § 1508.9, reads as follows:

> Environmental assessment:
>
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
>
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
>
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
>
> (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.



any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . . "[9] 42 U.S.C. § 4332(2)(E).

In brief, the congressionally imposed duty to develop and to evaluate alternatives is not confined to those instances where there may be "significant" impacts (the EIS threshold), but is far broader (with a lower threshold and a corresponding diminution in the documentation required).[10] Indeed, to take note of the actual practice of agencies throughout the government, the CEQ reports that in a given year approximately 450 EISs are prepared (both draft EISs and final EISs, so approximately 225 actual actions would be involved), while 45,000 EAs are prepared. *See* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 4, Jan. 1997 (also available at http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm); *see also Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) (noting that in a typical year 45,000 EAs are prepared compared to 450 EISs); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002) (same).

[9] 42 U.S.C. § 4332(2)(C)(iii) (§ 102(2)(C)(iii)), and 42 U.S.C. § 4332(2)(E) (§ 102(2)(E)), are the two sections of NEPA that independently impose obligations to study alternatives in the context of an EIS and an EA respectively.

[10] An EIS is expected to total fewer than 150 pages (300 for unusually complex proposals), (40 C.F.R. § 1502.7), while an EA is a "concise" document, (40 C.F.R. § 1508.9(a)), which contains "brief discussions" (40 C.F.R. § 1508.9(b)). CEQ recommends that EAs not exceed approximately 10 to 15 pages. CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Q. 36a, 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986).

In short, a significance threshold does not apply for an EA (but does apply for an EIS).

### (2) Section 102(1) Applies to Require Agencies to Administer Their Policies and Laws in Accordance With the Policies of NEPA.

Section 102(1) of NEPA provides, "[t]he Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administrated in accordance with the policies set forth in this Act, . . ." 42 U.S.C. § 4332(1) (§ 102(1)).[11] (These policies are set forth in NEPA section 101 (42 U.S.C. § 4331).)[12]

While describing the outcome of the House-Senate conference on NEPA, Senator Henry Jackson listed section 102(1) among the legislation's action-forcing procedures. 115 CONG. REC. 40416 (1969) (Statement of Sen. Jackson). Similarly, in an exhibit summarizing the key provisions of the Act, he noted that section 102(1) was among "the action-forcing procedures which will help insure that the policies enunciated in section 101 are implemented." *Id.* at 40419. The version of NEPA originally passed by the

[11] This Court had occasion to address the "fullest extent possible" language, which is common to 102(1) and 102(2), in *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-88 (1976). The Court quoted the legislative history and concluded that the phrase is a "deliberate command that the duty NEPA imposes . . . not be shunted aside in the bureaucratic shuffle." *Id.* The Court also observed that "NEPA's instruction that all federal agencies comply with . . . § 102 to the fullest extent possible is neither accidental nor hyperbolic." *Id.*

[12] The linkage between mandatory procedure and substantive policy criteria has been aptly described "the genius of NEPA." L. Caldwell, *Science and the National Environmental Policy Act*, at 74 (1982).



House of Representatives did not contain any action-forcing provisions. *See* 115 CONG. REC. 39702 (1969) (Statement of Rep. Dingell) (noting that the House bill contained no provisions comparable to section 102). It is worth noting, however, that the House conferees shared Jackson's view of the role of section 102(1). *See, e.g.*, 115 CONG. REC. 40925 (1969) (Statement of Rep. Mailliard) (characterizing section 102(1) as positive direction to agencies); *id.* at 40926-27 (Statement of Rep. Aspinall) (section 102(1) "tells the agencies to follow" environmental policy).

The actions required by section 102(1) have yet to be fully defined. The section has not received extensive judicial attention. *But see Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-88 (1976) (interpreting "fullest extent"); *Natural Res. Def. Council v. Sec. and Exch. Comm'n*, 606 F.2d 1031, 1044-49 (D.C. Cir. 1979) (discussing agency requirements under section 102(1)). Those courts that have addressed the issue have focused on two features of section 102(1). First, it makes environmental policy a part of every agency's mandate. *See, e.g.*, *Natural Res. Def. Council*, 606 F. 2d at 1044; *Envtl. Def. Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1175-76 (6th Cir. 1972). Second, it requires agencies to comply fully with that mandate. *See, e.g., Sierra Club v. ICC*, 1978 U.S. App. LEXIS 12538 (D.C. Cir. Feb. 21, 1978); *EDF v. Corps of Eng'rs*, 492 F.2d 1123 (5th Cir. 1974); *Envtl. Def. Fund*, 468 F.2d at 1175-76. Significantly, that requirement is not limited to the EIS process. *Natural Res. Def. Council*, 606 F. 2d at 1048-49; *see also Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1055-56 (D. P.R. 1981); *Montgomery v. Ellis*, 364 F. Supp. 517, 533-34 (N.D. Ala. 1973). In other words, agencies must fully comply with NEPA's section 102(1) even when there is no major federal action significantly affecting the quality of the human environment.

### C. This Case Presents a Paradigmatic "Ongoing Action" For Which NEPA Requires Supplemental Analysis

As noted above, this Court has most appropriately declared that it would be "incongruous" if blinders to adverse environmental effects, once removed, were restored "prior to the completion of agency action simply because the relevant proposal has received initial approvals." *Marsh*, 490 U.S. at 371. The very paradigm of such an ongoing action is presently before the Court. While some actions, in the nature of "projects," such as dams or highways, are finite, and once built, are complete, other forms of actions, such as programs or plans, may be ongoing and involve less truncated NEPA obligations.[13] Some involve ongoing actions to which, in this Court's

[13] As the Court noted in *Andrus*, 442 U.S. at 363 n.20, the CEQ Regulations provide that "actions tend to fall within" one of several categories, including projects (such as dams or highways), programs (such as the situation described by this Court in *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976), where multiple proposals with cumulative or synergistic effects must be considered together), policies (such as regulations adopted pursuant to the APA), or plans (such as those which guide or prescribe alternative uses of federal resources). 40 C.F.R. § 1508.18(b); *see also* 40 C.F.R. § 1502.4. As this Court has said, "[i]f environmental concerns are not interwoven with the fabric of agency planning, the action-forcing characteristics of § 102(2)(C) would be lost." *Andrus*, 442 U.S. at 350-51. In applying NEPA to such ongoing actions, CEQ has been acutely sensitive to the need for limits to ensure that while environmental impacts are being considered, their evaluation does not unduly delay the ongoing activities of government. In structuring their NEPA processes agencies are directed, therefore, to employ scoping and tiering and the other methods set out in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to "avoid duplication and delay." 40 C.F.R. § 1502.4(d); and *see* page 8, *supra*, (discussing tiering, and other tools designed to ease NEPA's implementation).



words, NEPA obligations continue to apply "when the remaining governmental action would be environmentally 'significant.'" *Marsh*, 490 U.S. at 371, *quoting Tennessee Valley Authority v. Hill*, 437 U.S. 153, n.34 (1978). The Court, in *Andrus*, 442 U.S. at 363, n.22, most appropriately quoted the Senate Report to conclude that "Major Federal actions 'include the expansion or revision of ongoing programs.'"[14] That Report continued to assert that "[t]he policies and goals set forth in section 101 can be implemented if they are incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public." S. REP. NO. 91-296 at 19 (1969).

The CEQ has also emphasized the importance of current and accurate information in NEPA analyses. Specifically, the NEPA regulations state that a supplemental analysis is necessary if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise. *See* 40 C.F.R. § 1502.9(c)(1)(ii).

As this Court has noted and as Congress has recognized, the goals of NEPA "could be incorporated into the everyday functioning of the Federal Government only with great difficulty." *Andrus*, 442 U.S. at 349-50 (citation to legislative history omitted). The task, of course, is to recognize NEPA's continuing applicability in those cases

[14] S. REP. NO. 91-296 (1969), in explaining the origin of section 102(2)(C), stated, "[e]ach agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statement, or expansions or revisions of ongoing programs," shall determine whether the proposal would have a significant effect on the environment. *Id.* at 20.

where the severity of the impacts remain amenable to agency amelioration while at the same time not attaching NEPA's documentary obligations to the sort of environmentally benign day-to-day routine management activities against which the Government in its brief appropriately cautions.

With respect to EISs the pertinent CEQ Regulation, section 1502.9(c), provides direction as to when supplement analysis is required. It states in part:

> (c) Agencies:
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) *There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.*
>
> (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so. [Emphasis added.]

In 1981, the CEQ offered guidance on the subject of SEISs, which retains its continuing validity:

> As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.
>
> If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).



CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18036, Q.32 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986).[15] Of course, where appropriate, EAs, with their lower thresholds of applicability, may need to be prepared to assist agencies in determining whether significant impacts exist.

It is *amici's* understanding that no Administrative Record was prepared in this case (the Government having concluded that there was no final agency action to warrant one). The factual underpinings of the case – the extent of environmental impact caused by ORVs on protected lands – must therefore be gleaned from the opinions of the courts below, the submissions of the parties, the publicly available NEPA documentation, which does bear on the actual impacts in the areas that are the subject of this

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[15] Courts routinely look to the "Forty Questions" for guidance. *See, e.g., Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) ("We apply the 'Forty Questions' here as persuasive authority offering interpretive guidance"); *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991, Thomas, Cir. J.); *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985, Breyer, Cir. J.).

litigation, and, less directly, by reference to published decisions in other cases involving similar impacts.[16]

In this proceeding, the District Court noted that SUWA presented expert testimony on "the significant resource damage, including soil erosion and compaction, and destruction of vegetation" attributable to ORVs. *Southern Utah Wilderness Alliance v. Babbitt*, 2000 U.S. Dist. LEXIS 22170, at *12 (D. Utah Dec. 22, 2000). SUWA alleged that "ORV user figures have skyrocketed in the past ten years." *Id.* at *26. The District Court noted that BLM admitted to being "well-aware that ORV-caused damage is resulting from cross-country travel in [Wilderness Study Areas]." *Id.* at *16. "BLM has recognized that ORV use on public lands generally has increased over the past few years." *Id.* at *28.

The Court of Appeal for the Tenth Circuit in this proceeding, *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), noted that the BLM's Implementation Management plan (IMP) "gives specific attention to ORV use when discussing impairing activity." *Id.* at 1228, n.7. For example, the Plan specified that cross-country ORV use constitutes environmental impairment "because 'the tracks created by the vehicles leave depressions or ruts, compact the soils, and trample or compress vegetation.'" *Id.* (*citing* the BLM IMP). The Court concluded that

[16] It is not the purpose of this brief to take a position for or against the use of ORVs. Rather it is its purpose to emphasize that the existence of environmental impacts on an ongoing and apparently increasing basis in an area under ongoing federal agency management and under consideration for wilderness designation may and should implicate certain of NEPA's "action-forcing" devises to determine whether there are environmental impacts which would warrant the agency (or the Congress or the President) taking action to address those impacts.



SUWA's complaint "presents colorable evidence suggesting that ongoing ORV use has or is impairing the disputed WSA's wilderness values." *Id.* at 1233.

There were earlier NEPA documents covering at least portions of the geographic area that is the subject of this litigation. (*Amici* have been unable to determine their full scope.) For instance, the "Grand Resource Area Proposed Management Plan: FEIS," Moab District, Grand Resources Area (1983), discussed the designation of 1,183,660 acres as open to ORV use, and discussed the impacts on soil and water quality, vegetation, livestock grazing, and recreation, stating "Soils and Water Quality . . . Recreational ORV use is expected to increase on 47,840 acres. The severity of the impact would depend on the intensity of use. The effects of ORV activity on the desert environment are serious, long-lasting, and highly visible. . . ." Appellants' (SUWA et al.) Tenth Circuit Appendix (Appendix) at 632. The EIS went on to discuss limiting ORV use on 596,234 acres and the impacts that would have on soil and water quality, vegetation, livestock grazing, transportation, special designation areas, and visual resources and recreation. *Id.* at 632-633; *see also* "San Rafael: Proposed Resource Management Plan/FEIS" Moab District, San Rafael Resource Area (1991) at RMP-45 (projecting an assessment of ORV accessible road needs); Appendix at 109, 129 – EA Number UT-050-089-084-EA, "Off-Road Vehicle Implementation" Henry Mountains Planning Area (Aug. 1990) (projecting low ORV use); Appendix at 683 – EA UT-040-0-121, "Off-Road Vehicle Designation" Kanab Resource Area (Sept. 1980) ("[d]esert soils are particularly vulnerable to damage from ORV use") and *id.* at 687 (". . . no type of land can withstand sustained ORV use without some damage"). (Recent BIA "actions," at least one of

which resulted in NEPA documentation, are discussed in Section I(D)(1), *infra*.)[17]

More generally, courts in other proceedings have had occasion to deal with ORV impacts – alleged or real – on the environment. *See, e.g., Mausolf v. Babbitt*, 125 F.3d 661, 669 (8th Cir. 1997) (upholding Park Service closure of portion of park to snowmobiles based on impact on gray wolf); *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468 (9th Cir. 1994) (upholding Forest Service decision to close forest to ORVs based on damage to trails and species); *Sierra Club v. Clark*, 774 F.2d 1406, 1408-09 (9th Cir. 1985) (upholding BLM decision to allow ORV use in WSA after an EIS was prepared); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 106 (D.D.C. 2003) (appeal pending) (setting aside Park Service rule allowing 950 snowmobiles a day into Yellowstone Park, quoting agency

[17] *Amici* understand from the record and the briefs of Respondent SUWA that there have been marked increases in ORV use in at least some of the areas involved since these earlier NEPA documents were prepared. For example, BLM manager for Henry Mountains area "admitted in his deposition testimony that" there had been a "very noticeable" and marked increase in ORV use in this area. *See* Appellants' (SUWA et al.) Opening Brief for the Tenth Circuit at 23. In addition, BLM issued an "emergency ORV closure" for "portions of the San Rafael Swell" and explained the necessity of the closure in part because "ORV use in the San Rafael Swell has increased tremendously" since the 1991 San Rafael EIS was completed. *See* 65 Fed. Reg. 15169-70 (March 21, 2000). Also, the BLM field office manager for the Behind the Rocks area admitted that there has been a "significant increase" in ORV use since the mid-1990s in the area. *See* Appellants' Opening Brief for the Tenth Circuit at 24. Finally, at the preliminary injunction hearing in the district court, a BLM assistant manager testified that "there has been a substantial increase in the off-road activity in the Indian Creek area" since the 1991 San Juan RMP was finalized. *Id.*



environmental studies of adverse impact on wildlife, air quality, natural surroundscapes, and natural odors.)

The potential for impact on public lands occasioned by ORVs has twice been addressed by the President, in both instances with the assistance of the CEQ. Two years after NEPA's enactment President Nixon signed Executive Order 11644 (1972) to limit the use of off-road vehicles on public lands. Exec. Order 11644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended in* 42 U.S.C.A. § 4321. In his February 8, 1972, message to Congress on the environment the President noted that the use of ORVs "is dramatically on the increase" and "[t]oo often the land has suffered as a result." *See* CEQ, *Environmental Quality* 1972 at 379. Several years later President Carter signed Executive Order 11989 (42 Fed. Reg. 26959 (May 25, 1977)), which tightened those limitations, finding in his message to Congress on the environment of May 24, 1977, that "[u]ncontrolled, [ORVs] have ruined fragile soils, harassed wildlife, and damaged archeological sites." CEQ, *Environmental Quality* 1977 at 356.

*Amici* respectfully submit that NEPA applies to the ongoing actions of BLM in its continuing management of areas under consideration for wilderness designation where "significant new circumstances or information relevant to environmental concerns" is present – such as a significant increase in ORV use with a resulting potential for significant increase in environmental impact. *See* 40 C.F.R. § 1502.9(c). While the record is sparse, the allegations of the plaintiffs below (respondents before this Court) would appear, if true, to pass the threshold of significance for an SEIS under section 102(2)(C). At minimum, section 102(2)(E) would apply, as it requires an examination of alternatives arising from "unresolved conflicts" concerning

"alternative uses of available resources." The resulting EA may or may not then lead to an EIS. The requirements of section 102(1) are similarly controlling upon the ongoing actions to be taken by BLM. *Amici* would suggest the matter be remanded, with appropriate direction to prepare an SEIS or, at minimum, to prepare a EA to determine whether such an EIS is needed. In its supplemental document the agency need not examine the impact of ORVs de novo, but need only supplement what it had done before.[18]

### D. Even If No Supplemental Analysis Were Required For the Entire Ongoing Action, NEPA Is Nevertheless Applicable For Other Reasons

#### (1) There Have Been "Actions" Involving Less Than the Entire Geographic Area At Issue Here That Clearly Implicate NEPA.

In addition to the "on-going action" discussed above, this case presents more discrete, narrower "actions" that clearly trigger NEPA coverage (though not necessarily an EIS). Specifically, the BLM has issued several recent decisions regarding ORV access to various geographic

[18] We suggest an analogy to another case involving an agency's ongoing activity (or inactivity) resulting in a continuing course of environmental degradation. As the Fifth Circuit held in *Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985), *cert. den.* 475 U.S. 1044 (1986), a periodic permit renewal "will not maintain a status quo, but rather will continue a course of environmental disruption begun years ago." *Id.* at 1086. The Court of Appeals directed the trial court on remand to compare the environmental impact if the ongoing activity were allowed to continue for another five years with the projected condition if it were halted now. *Id.*



areas at issue in this case:[19] (With two exceptions, the briefs and documents cited do not show NEPA compliance.)

- For the Indian Creek Canyon Corridor, the BLM issued vehicle and camping restrictions limiting all motor vehicle and mountain bike travel to "existing roads and trails." 63 Fed. Reg. 110 (Jan. 2, 1998).
- In 2000, the Kanab Field Office adopted a land use plan amendment for the Moquith Mountain area. 65 Fed. Reg. 19921 (Apr. 13, 2000). The plan amendment focused on numerous concerns, including sensitive species and vehicle management, and "[o]ver 95 percent of the WSA is closed to [ORV] use." *See* Brief of Respondents, Utah Shared Access Alliance (USAA Brief) at 7 (citing to testimony of planning team leader describing planning process at 407). (The Brief notes that an EA was prepared. USAA Brief at 7.)
- The Moab Field Office released an "interim" restriction order that revised "open" travel designations and limited ORV use to existing roads and trails on approximately 245,642 acres. 66 Fed. Reg. 6659-6661 (Jan. 22, 2001). The restriction order also closed other specified locations to vehicle access. *Id.*; USAA Brief at 8.
- The Price Field Office also completed the San Rafael Route Designation Plan. This plan analyzed vehicle access issues under the purview of the Price Field Office, including the seven WSAs

[19] As stated in the Brief for Respondents, Utah Shared Access Alliance, *et al.* (aligned with the Government in this case) at 6, "BLM has also issued numerous project level decisions affecting vehicle access to specific areas targeted in SUWA's preliminary injunction motion."

covered by the March, 2000 closure order. The plan authorizes continued ORV travel along 677 miles of "secondary [ORV] routes" and closes 468 miles of routes to vehicle access. USAA Brief at 8; *see also* Environmental Assessment (January 31, 2002), available at http:// www.ut.blm.gov/ sanrafaelohv/ea/ea1contents. htm.

These actions, while confined to discrete geographical portions of the whole area at issue in this litigation, are themselves "actions" within the meaning of NEPA. Indeed, the Solicitor General has already conceded that agency decisions regarding ORV use are subject to section 706(1) of the APA. In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738-39 (1998), this Court noted that Land Use Plans that "close a specific area to off-road vehicles . . . can result in immediate concrete injury to a party with interest in the use of off-road vehicles in that area," thereby permitting immediate judicial review. This Court ultimately held that the *Ohio Forestry* plaintiffs did not have a justiciable claim under the APA. But at the same time, with significance for the instant case, the government conceded that if the *Ohio Forestry* plaintiffs' claim had been "that the plan was allowing motorcycles into a bird-watching area or something that like [sic], that would be immediately justiciable." *Id.* at 739.

**(2) The Various Separate "Actions" Described in Section D(1) Above Could Constitute A "Program" Requiring Comprehensive Examination Under NEPA.**

The subsidiary actions described under section D(1) above, each individually a potential NEPA trigger, together could constitute a program under NEPA that would also implicate NEPA's obligations. *See* 40 C.F.R. § 1508.18(b)(3) (an action includes the "[a]doption of programs, such as a



group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive"); § 1502.4 (scope of EIS); § 1502.20 (tiering); 40 C.F.R. § 1508.23 ("A proposal may exist in fact as well as by agency declaration that one exists"); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (noting "general agreement" with the basic premise that section 102(2)(C) may require a comprehensive impact statement, for instance where several proposed actions are pending at the same time).[20] "Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Id.* at 410.

Whether such a "program" exists is a factual question for the lower court to determine. However, should the lower court find that such a program exits based on facts including those discussed above, then the agency's failure to evaluate the environmental impacts of the program could violate NEPA.

**(3) Section 102(1) Commands Agencies to Pay Heed to the National Environmental Policy**

As discussed in section I(B)(2) above, NEPA section 102(1) requires that agencies interpret and administer the policies, regulations, and public laws of the United States in accordance with NEPA's policies.

The BLM appears not to have heard that command. The BLM suggests that the Tenth Circuit's holding is "particularly troubling in light of [that] court's suggestions

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[20] The comprehensive EIS dealing with multiple proposals has come to be known as a "program" or "programmatic" EIS.

that BLM's resource constraints could not provide any justification for denying . . . relief." Pet. Brief at 39. Apparently, the BLM fears that NEPA will be invoked "to reorder agency priorities for the allocation of scarce resources,"[21] a possibility that it characterizes as "inimical to the effective functioning of government and to the separation of powers." Pet. Brief at 40.

*Amici* recognize that judicial second-guessing of administrators is generally poor policy. But agency disregard of Congressional direction is much worse. Congress has declared that section 102(1) was designed "to make it clear that each agency of the Federal Government shall comply with the directives set out in [section 102] unless the existing law applicable to such agency's operations" expressly prohibits or makes full compliance with one of the directives impossible. 115 CONG. REC. 40418 (1969) (Statement of Sen. Jackson explaining the intent of Senate participants in the Conference Committee considering NEPA); *see also* 115 CONG. REC. 39703 (1969) (Statement of Rep. John Dingell explaining the intent of House conferees); *Flint Ridge*, 426 U.S. at 785. BLM's brief identifies no statute or regulation that expressly prohibits the Bureau from allocating its resources so as fully to comply with NEPA. Nor has it identified any existing law that would render such an allocation impossible. *Amici* therefore urge this Court to reaffirm *Flint Ridge* by refusing to allow BLM to use "resource allocation" to excuse its failure to comply with NEPA.

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[21] The Government's choice of wording is particularly unfortunate in light of NEPA's requirement for the analysis of alternatives to any proposal "which involves unresolved conflicts concerning alternative uses of available resources; . . . " 42 U.S.C. § 4332(2)(E) (§ 102(2)(E)).



Petitioners' argument that non-compliance should be excused because BLM may perform NEPA analyses in the near future is similarly unavailing. Specifically, Petitioners assert that SUWA is not entitled to relief because BLM will conduct NEPA analyses "as circumstances permit . . . in connection with its contemplated revision of land use plans" Pet. Brief at 40. The vagueness of Petitioners' language only confirms that BLM is not committed to complying with NEPA in the near future. Even if it were, the idea that such a commitment would preclude liability for BLM's current failure to comply contradicts this Court's interpretation of section 102 in *Flint Ridge*. *See Flint Ridge*, 426 U.S. at 787. It also conflicts with Congress' clear intent that agencies fully comply with NEPA unless existing law prohibits compliance or renders it impossible, for no such law exists here. *See* 115 CONG. REC. 40418 (1969) (statement of Sen. Jackson); *see also* 115 CONG. REC. 39703 (1969) (statement of Rep. Dingell). Furthermore, Petitioners' argument runs counter to precedent in the Courts of Appeal holding that the fulfillment of future obligations does not excuse a current failure to act. *See Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993).

### (4) CEQ's NEPA Regulations Treat "Inaction" Reviewable As "Action" Under the APA as "Action" for Purposes of NEPA's EIS Requirement.

The CEQ regulations consider unlawful inaction by an agency to be an "action" for purposes of NEPA. *See* 40 C.F.R. § 1508.18 (defining "major federal action" in part, "[a]ctions include the circumstance where the responsible officials fail to act and that failure is reviewable by courts

or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action").[22] The Tenth Circuit held that the BLM's "inaction" with regard to ORV damage to the WSAs constitutes "agency action unlawfully withheld or unreasonably delayed" under the APA. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1229 (10th Cir. 2002). If this Court upholds that determination, such "inaction" also constitutes an "action" under NEPA.

As we emphasized in the Statement at the beginning of this brief, we take no position on the proper implementation of the APA and other issues presented by this appeal. We note the provision within section 1508.18 only to indicate that were the Court to affirm the Tenth Circuit with respect to its interpretation of the APA, certain NEPA obligations would follow. Of course, the converse does not necessarily follow. Section 1508.18 in defining what constitutes "major federal action" deals only with the threshold requirement for an EIS under section 102(2)(C). It does not affect the lower threshold, discussed in section I(B)(1) of this brief, for an EA prepared under section 102(2)(E).

[22] In *Ramsey v. Kantor*, 96 F.3d 434, 444-445 (9th Cir. 1996), the Ninth Circuit found that a "mandatory obligation" to review certain plans sufficient to make the failure to disapprove those plans a major federal action under NEPA. *Id. citing* 40 C.F.R. § 1508.18. Thus, the Ninth Circuit concluded that the Secretary's failure to disapprove the plans rises to the level of major federal action for purposes of NEPA. *Id.*



### (5) The Government Concedes That Citizens Can Request Particular Actions from Agencies, Thereby Implicating NEPA.

The government alleges that "the appropriate course" for citizens concerned "that an agency is not administering a program in accordance with statutory requirements" is to "request particular action from the agency." *See* Pet. Brief at 36. The government concedes that the agency's action on this request would then constitute final agency action, and would be reviewable under section 706(2) of the APA. *Id.*[23]

While acknowledging – and appreciating – the Government's concession, *amici* do note that the proffered avenue of relief, while welcome, can be extraordinarily time-consuming.[24]

[23] In its Reply Brief for Petitioners, at page 10, supporting its application for a writ of certiorari the Government stated:

> If a party such as SUWA believes that an agency should take final agency action to implement a statutory standard, the party may petition the agency for a rulemaking. *See, e.g.*, 5 U.S.C. 553(e). If the petition is denied, the party may seek judicial review under Section 706(2) based on the agency's explanation and the administrative record. And if the agency delays unreasonably in responding to such a petition, Section 706(1) may come into play to compel the agency to respond, although not how to respond.

[24] If an agency is truly responsive, the Government's suggestion can be a most welcome one. If, however, an agency chooses neither to act nor decline to act upon a proposal, courts have traditionally been, understandably, reluctant to mandate speedy action on the part of often burdened agencies. *See, e.g., Fund for Animals v. Norton*, 294 F. Supp. 2d at 113 (a reasonable time for an agency decision could encompass months, occasionally a year or two).

## CONCLUSION

In short, NEPA is a vital and crucial tool that agencies use to evaluate the environmental impacts of their actions – both projects and programs. We urge the Court to recognize, as it did in *Marsh v. Oregon Natural Res. Council*, *supra*, that not all federal actions are one time events, with one-time NEPA responsibilities. Many involve sequences of ongoing action that involve ongoing responsibilities under NEPA. We urge the Court to reaffirm the principle that during the course of an ongoing federal action, the government's obligation to take a hard look at environmental consequences is not terminated by a single decision or NEPA document if those consequences exceed earlier projections and the agency action is a continuing one. Agency consideration of later-arising circumstances or information regarding the environmental impacts of its actions, while those actions remain ongoing, is essential to fulfilling NEPA's goals of environmentally informed decision-making.

In these circumstances we respectfully suggest that the ongoing NEPA responsibilities (as described in this brief) that attach to BLM's ongoing actions merit recognition by this Court and require further compliance by the agency whose ongoing actions are the subject of this case.

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Respectfully submitted,

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